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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK GLEN DOMINGUEZ,

Defendant and Appellant.

A098041

(Napa County
Super. Ct. No. CR 103865)

Frank Glen Dominguez appeals following his conviction by a jury verdict of willfully evading a peace officer while driving with willful and wanton disregard for the safety of persons and property, and four other misdemeanor violations. (Veh. Code, § 2800.2, subd. (a).)

Defendant was sentenced to 25 years to life under the three strikes law after the jury found that he committed two prior serious felonies: a 1988 burglary conviction and a 1993 conviction for shooting at an inhabited dwelling. (Pen. Code, §§ 459, 246.) He argues that his sentence constitutes cruel and unusual punishment. We reject this contention and affirm.

BACKGROUND

In 1988, when defendant was 36 years old, a jury convicted him of residential burglary. Defendant masterminded a burglary scheme in which he directed minors to execute burglaries and turn the stolen merchandise over to him. Defendant picked out the

residences, instructed the minors, and paid them in drugs or small amounts of cash. He was sentenced to the aggravated term of six years in state prison.

In 1993, defendant was charged with shooting at an inhabited dwelling. Defendant had pulled up outside a residence in a vehicle with blacked-out windows, and fired numerous rounds from a shotgun into the front room of the residence. There was some indication that he had a prior dispute with the resident. Defendant entered a plea of no contest in exchange for a total sentence of four years in state prison.

The current offense occurred on February 7, 2001. At that time, defendant was 49 years old, had been on parole for only a couple of months, and had a parole condition that he abstain from drinking alcohol. Defendant was drinking on February 7 and got into a fight at the home of some friends. The friends called their daughter, Patricia Rhorer, to give defendant a ride home. Rhorer and her boyfriend, Brian Hughes, went to Rhorer's parents' home to try to convince defendant to leave. Defendant was drunk to the point of falling down. Hughes climbed in defendant's truck to drive him home, but defendant pushed him out of the truck and started driving down the street. Rhorer called the police.

Napa police officers Doug Rosin and Brent Potter responded. Rosin was driving a marked police car. The officers saw defendant backing his truck into a driveway. Officer Rosin activated his red light and ordered defendant to stop the vehicle. Defendant did not stop and Rosin was forced to back up to avoid a collision. Rosin activated his emergency lights and siren and pursued defendant.

Defendant fled from the officers at speeds of up to 50 miles an hour over a six or seven block area for a period of approximately six minutes. During that time defendant was weaving, speeding, running stop signs, driving up the center of the road and causing other motorists to take evasive action. Defendant made an abrupt turn into an alley and sideswiped a parked car. At an intersection, defendant collided with an occupied vehicle. Defendant failed to stop and continued fleeing from the police at speeds up to 50 miles an hour in 25 and 30 mile an hour zones.

As defendant drove through another stop sign, he lost control of his truck and crashed into the rear of two parked cars. The impact caused major damage to defendant's

truck. The officers approached defendant's truck and ordered him out. Defendant was conscious, but failed to respond. The officers pulled him from the truck. Defendant was bleeding from cuts near his mouth and ear.

Defendant was handcuffed and transported to the hospital. A blood test showed a blood alcohol level of .22 percent, nearly three times the legal limit. Defendant is a life-long alcoholic who began drinking at the age of ten. He had no recollection of the events surrounding the police chase. The only times in his life that he had been able to abstain from alcohol for more than six months were times when he was in prison. He was unable to stop drinking and once he started, he inevitably continued until he blacked out.

In an information filed on April 30, 2001, the district attorney charged defendant in count one with felony evading an officer with willful and wanton disregard for the safety of persons and property in violation of Vehicle Code section 2800.2, subdivision (a). Count two alleged misdemeanor hit and run driving in violation of Vehicle Code section 20002, subdivision (a). Count three alleged misdemeanor driving under the influence of alcohol (DUI) with a prior DUI conviction. (Veh. Code, §§ 23152, subdivision (a); 23103.) Count four alleged misdemeanor driving with a blood-alcohol level of .20 percent or higher. (Veh. Code, §§ 23152, subd. (b); 23206.1.) Count five alleged misdemeanor driving with a suspended license due to another DUI conviction. (Veh. Code, § 14601.2, subd. (a).) The information also alleged prior convictions and the two prior strikes.

A jury found defendant guilty as charged and found that the prior conviction allegations were true. The court denied defendant's motion to strike the prior convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) and imposed a sentence of 25 years to life. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends that his sentence of 25 years to life for evading an officer is cruel and unusual punishment under article I, section 17 of the California Constitution and the Eighth Amendment of the United States Constitution.

Respondent argues that defendant waived this argument by failing to raise it in the trial court. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583 [finding of waiver but court addressed issue]; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27 [issue held waived but merits addressed].) Defendant here did not specifically address cruel and unusual punishment in the trial court, but did ask the court to strike the prior strikes under *Romero, supra*, 13 Cal.4th 497.

Counsel argued that defendant's personal characteristics and the nature of the offenses did not warrant a sentence that would result in defendant dying in prison. In ruling on the *Romero* motion, the court reviewed the nature of the offense and the offender, and exercised its discretion not to strike the prior convictions. This determination is at least an implied finding that the sentence is not disproportionate to the crime. We conclude that defendant sufficiently raised the issue of the harshness of the punishment.¹

The *Andrade* and *Brown* Cases Do Not Control Defendant's Case

Defendant argues that his sentence is grossly disproportionate to the offense, relying primarily on the analysis in *Brown v. Mayle* (9th Cir. 2002) 283 F.3d 1019 (*Brown*), and *Andrade v. Attorney General of State of California* (9th Cir. 2001) 270 F.3d 743, 758, cert. granted, *sub nom. Lockyer v. Andrade* (2002) 535 U.S. 969 (hereafter *Andrade*). Defendant concedes that California courts have rejected the *Andrade* analysis. (See, e.g., *People v. Romero* (2002) 99 Cal.App.4th 1418, 1422; *People v. Mantanez* (2002) 98 Cal.App.4th 354, 363-364.) However, even if we agreed with the federal *Andrade* analysis, this case is distinguished by the gravity of defendant's criminal history and the dangerous nature of his most recent conviction. *Andrade* and *Brown* involved sentences of 50 and 25 years to life for crimes of petty theft that had been elevated to felony status based on prior theft convictions. In contrast, defendant engaged in dangerous activity with a willful disregard for public safety. His prior offenses were serious, dangerous, and sometimes involved weapons. He is not in the same situation as

¹ Defendant filed a petition for writ of habeas corpus addressing the waiver issue. We have denied the petition by a separate order filed this date.

a defendant who sustains a third felony conviction solely because of a prior theft conviction.

Federal Constitutional Standards

The Eighth Amendment of the United States Constitution prohibits punishment that is grossly disproportionate to the crime. (*Solem v. Helm* (1983) 463 U.S. 277, 285-286 (*Solem*). Federal courts generally examine several factors in reviewing the harshness of a sentence including the nature of the offender, the gravity of the offense, the harshness of the penalty, a comparison of the sentence to penalties for more serious crimes in the same jurisdiction and a comparison to the sentence imposed for the same crime in other jurisdictions. (463 U.S. at pp. 290-292.)²

Federal courts have noted that when the initial comparison of the crime and the punishment do not raise an inference of disproportionality, no inter- or intra-jurisdictional comparison of sentences is necessary. (See, e.g., *Andrade, supra*, 270 F.3d 743.)

A. The Nature of the Offender, Offense and Penalty

Defendant discounts the danger inherent in his crime of fleeing from the police and driving with willful and wanton disregard for the safety of the public. He argues that because the offense is a wobbler, chargeable as a felony or misdemeanor, the Legislature has indicated a lack of concern with such offenders. We disagree. “It would seem clear as a matter of logic that any felony whose key element is ‘wanton disregard’ for human life necessarily falls within the scope of ‘inherently dangerous’ felonies.” (*People v. Johnson* (1993) 15 Cal.App.4th 169, 173.)

Also, drunk driving is a particularly dangerous crime and repeat offenders are an even more serious threat to the public than a first offender. “The specter of drunk driving

² *Harmelin v. Michigan* (1991) 501 U.S. 957 (*Harmelin*), somewhat weakened the decision in *Solem*. In *Harmelin*, Justice Scalia and Chief Justice Rehnquist concluded that the three-factor test in *Solem* was wrong and the Eighth Amendment contains no proportionality guarantee. (*Harmelin, supra*, 501 U.S. 957, 965 (lead opn. of Scalia, J.).) Justices Kennedy, O’Connor and Souter, adhered to the proportionality rule and concluded that the Eighth Amendment forbids sentences that are grossly disproportionate to the crime. (501 U.S. at p. 1001 (conc. opn. of Kennedy, J.).) We have utilized a proportionality test in response to defendant’s contentions on appeal in this case.

falls across the highways of this country like a shadow of death. The public threat engendered by an intoxicated driver encompasses not only the life of the driver but also the life of every individual who may cross his path.” (Comment, *Constitutional Law—State v. Downey: Sobriety Roadblocks Under Article I, § 7 of the Tennessee Constitution* (1999) 29 U.Mem. L.Rev. 485, 506.) “ ‘[T]he catastrophes associated with drunk driving, the tragic loss of life and the permanent debilitating injuries that can result have reached nearly epidemic proportions across the nation.’ ” (Note and comment, *Is the DUI Double Jeopardy Defense D.O.A.?* (1996) 29 Loyola L.Rev. 1273, 1314 [hereafter, Loyola].)³

Whether the offense in the abstract may be charged as a misdemeanor does not enlighten the analysis in this case. Defendant’s offense was charged and proven to be a felony. He was not only evading the police, but was driving while extremely intoxicated. As a repeat drunk driver who is more likely to kill someone than a first time offender, defendant posed an extreme menace to the public.⁴ To argue that this crime is viewed by society as among the less serious offenses is to ignore reality as well as the facts of this case.

Defendant contends that because his personal history of alcohol addiction was the motivating factor in his crime, leniency in sentencing is appropriate. Although we evaluate a particular defendant’s culpability, based on his age, personal characteristics and state of mind, little in defendant’s background counsels clemency. (*People v. Dillon* (1983) 34 Cal.3d 441, 479 [noting relevant individual factors].) Defendant is 50 years old, with a lengthy criminal record. Chemical addiction “is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems

³ “Drunk driving is one of the most commonly committed crimes in the United States. In fact, for every motorist arrested for driving under the influence (DUI), there are an estimated 2000 drunk drivers who go undetected. In 1994 alone alcohol contributed to 16,884 traffic fatalities.” (Loyola, *supra*, 29 Loyola L.Rev. at p. 1273 [fn. omitted].)

⁴ “The risk of a driver who has one or more DWI convictions becoming involved in a fatal crash is about 1.4 times the risk of a driver with no DWI conviction.” (<http://www.madd.org/stats/0,1056,4542,00.html> (as of Feb. 5, 2003).)

unwilling to pursue treatment.” (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 (*Martinez*).)

In addition, defendant was not sentenced for his current crime alone. He was sentenced for being a recidivist. The United States Supreme Court has acknowledged the validity of a state’s interest in “dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.” (*Rummell v. Estelle* (1980) 445 U.S. 263, 276 [life sentence for obtaining \$120.75 by false pretenses with two prior thefts not cruel and unusual punishment].)

Defendant’s prior crimes include shooting into an inhabited dwelling, giving drugs to minors in exchange for the commission of burglaries, weapons possession, selling drugs and numerous drunk driving offenses. His criminal history discloses an unabated series of prison sentences followed by multiple parole violations and resulting re-incarcerations. His record shows five parole violations after being released from his last prison term in 1995.

Defendant was newly paroled at the time of his most recent offense and already in violation of an abstinence condition. He admitted that he had failed to address his addiction and the only time he stayed sober for any length of time was when he was in prison. Unlike the defendant in *Andrade*, defendant’s predicate felony convictions were not adjudicated in a single proceeding. (*Andrade, supra*, 270 F.3d 743, 748-749.) Defendant’s criminal record is lengthy, stretching back to 1974, with offenses recorded every two to four years since then. He incurred his first felony strike in 1988 and his second strike in 1993. Essentially, when defendant is not in custody, he is drinking and committing crimes. There are no factors in the nature of the crime or in defendant’s personal history that give rise to an inference of disproportionality. As the district attorney observed at defendant’s sentencing hearing: “I can’t think of a more proper candidate that should get life in prison . . . he has earned his way to this sentence”

B. Punishment for Other Crimes in California

There is authority for the conclusion that intra- and inter-jurisdictional comparisons are appropriate “only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.” (*Harmelin, supra*, 501 U.S. at p. 1005.) Although defendant’s case is not one of those rare cases, even if we consider his comparison argument, there is no disproportionality of constitutional significance.

Defendant focuses almost entirely on his current offense of evading an officer to argue that a life sentence for a non-violent crime is disproportional. He argues that only the sentences of death and life without parole are more harsh and those sentences are for much more serious crimes.⁵

This portion of the argument fails to recognize that the three strikes law punishes recidivists. Defendant cannot compare the sentence for a single offense to a three strike sentence for multiple offenses that punishes recidivism itself. Furthermore, although defendant’s offenses may not have been classified as violent in the Penal Code, they were in fact serious and dangerous crimes. (*Martinez, supra*, 71 Cal.App.4th at p. 1510 [noting that offenses committed while driving while intoxicated pose a risk of death or serious bodily injury].)

In addressing other California recidivist statutes, defendant claims that they require the triggering crime to be of equal severity to the priors.⁶ Defendant minimizes his prior felony strikes by referring to his conviction based on his running of a burglary ring and paying his minor “employees” with drugs as merely involving an aiding and abetting theory. He attempts to dismiss his conviction for spraying an inhabited dwelling

⁵ Defendant compares, for example, 11 years for voluntary manslaughter, eight years for mayhem, kidnapping and rape.

⁶ Here defendant cites several code provisions including section 667.75 (17 years to life for selling controlled substance to minor if current offense for similar conduct); section 667.51 (15 to life for lewd acts with children if current offense is also violation of § 288); section 667.6, subdivision (b) (10-year enhancement for similar type of sex crime), and section 667.61 (life with 25 year minimum for sex offenders if current offense involves similar sexual conduct).

with bullets as an alcohol-related event that is not a statutory violent felony. The fact that the three strikes sentencing scheme does not require a similar triggering offense has no constitutional significance and does not support defendant's argument. "[E]ven if under the three strikes law California's recidivists are punished more severely than other recidivists, such severity does not render the punishment grossly disproportionate to the crime." (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823-824, citing *Harmelin, supra*, 501 U.S. at p. 1005.)

Defendant also argues in passing that the court in *Brown, supra*, 283 F.3d 1019, observed that punishing a defendant for a present non-violent felony raises "serious double jeopardy concerns." However, the *Brown* court recognized that recidivist sentencing schemes have been repeatedly upheld against double jeopardy arguments. (*Id.* at pp. 1035-1036.) The court explained that when subsequent convictions show a defendant's inability to conform to society's norms or involve the repetition of a particular offense characteristic, no double jeopardy concern exists. (*Id.* at p. 1036.) Defendant's crimes show an inability to control his alcohol abuse and an inclination to repeatedly commit dangerous crimes whenever he is drunk. There is no double jeopardy issue.

C. Punishments for the Same Offense in Other States

Defendant's main argument about punishment for recidivism in other states is that a life sentence for a nonviolent felony after two prior serious felonies does not exist in federal law or the law of 27 other states. He relies on the analysis in *Martinez, supra*, 71 Cal.App.4th 1502, and his own survey of the law of other states. He lists a number of other states where the sentence for a recidivist convicted of any felony is less than 25 years to life. However, *Martinez* also noted that Louisiana and Mississippi impose sentences of life without parole for a third felony that is not violent or serious. (*Id.* at p. 1516.)

"That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. . . . Otherwise, California could never take the toughest stance against repeat offenders or any other type

of criminal conduct.” (*Martinez, supra*, 71 Cal.App.4th at p. 1516.) “. . . ‘[T]he judiciary should not interfere in the [legislative weighing of sentencing policy factors] unless a statute prescribes a penalty “ ‘out of all proportion to the offense.’ ” ’ [Citation.]” (*Ibid.*)

We have reviewed defendant’s extensive criminal history, his use of weapons and employment of minors in his criminal activities, and his lengthy and injurious alcoholism and alcohol-related dangerous conduct. When prior punishment has not deterred a repeat offender, particularly one who endangers the public by fleeing from police while intoxicated, a state need not wait until someone is killed to remove that offender from society.

California Standards

Defendant concedes that California courts do not follow the analysis of *Andrade*. He has not presented a separate argument based on California law. A sentence violates the California constitutional ban on cruel and unusual punishment “[i]f the penalty imposed is ‘grossly disproportionate to the defendant’s individual culpability’ [citation], so that the punishment “ ‘ ‘shocks the conscience and offends fundamental notions of human dignity’ ” ’ [Citation.]” (*People v. Lucero* (2000) 23 Cal.4th 692, 739-740.) The California Constitution “ ‘. . . “separately and independently lays down the same prohibition” ’ ” as the federal constitution. (*Id.* at p. 739.) Based on our review of the facts of this case, defendant’s punishment is not grossly disproportionate and does not shock the conscience.

CONCLUSION

The judgment is affirmed.

Marchiano, P.J.

We concur:

Stein, J.

Swager, J.